

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

June 20, 1995

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-357-D
ON BEHALF OF SAMUEL KNOTTS,	:	
Complainant	:	MORG CD 94-3
v.	:	
	:	Coalbank Fork No. 12
TANGLEWOOD ENERGY, INC.;	:	
FERN COVE, INC.;	:	
RANDY BURKE, AND RANDALL KEY,	:	
Respondents	:	

DECISION

Appearances: James V. Blair, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for the Complainant;
Paul O. Clay, Jr., Esq., Fayetteville,
West Virginia, for Respondents.

Before: Judge Maurer

STATEMENT OF THE CASE

This case is before me upon the complaint by the Secretary of Labor on behalf of Samuel W. Knotts under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq., the "Act", alleging that Mr. Knotts was discharged by the respondents on January 28, 1994, in violation of section 105(c)(1) of the Act. The Secretary seeks back wages and interest for Mr. Knotts as well as civil penalties against the respondents. Respondents maintain that Knotts was not discharged in violation of the Act, but rather was discharged because of his involvement in an allegedly unprotected 2 hour conversation with an outside mining engineer representing the land owners that respondents perceived to be negative and inflammatory in nature.

Pursuant to notice, an evidentiary hearing was held at Fairmont, West Virginia on January 19-20, 1995. Subsequently, both parties have filed post-hearing proposed findings of fact

and conclusions of law which I have considered along with the entire record and considering the contentions of the parties, make this decision.

STIPULATIONS

The complainant and respondents have stipulated to the following:

1. The Coalbank Fork No. 12 Mine is a coal mine and is operated by Fern Cove, Inc.

2. Fern Cove, Inc. is a successor in interest to Tanglewood Energy, Inc. at the Coalbank Fork No. 12 Mine.

3. The products of the Coalbank Fork No. 12 Mine enter commerce and the Coalbank Fork No. 12 Mine is therefore subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (hereinafter "the Mine Act").

4. The administrative law judge has jurisdiction to hear and decide this case.

5. The assessed violation history report may be used in determining an appropriate civil penalty.

6. For purposes of the assessment of civil penalties the violation history of Tanglewood Energy, Inc. at the Coalbank Fork No. 12 Mine shall be considered to be the violation history of Fern Cove, Inc. and vice versa.

7. Fern Cove, Inc. and Tanglewood Energy, Inc. are jointly and severally liable for all civil penalties assessed against either by the Federal Mine Safety and Health Review Commission relative to the Coalbank Fork No. 12 Mine.

8. Complainant Samuel Knotts was discharged by respondent on January 28, 1994.

9. Complainant Samuel Knotts was discharged because of respondent's belief that he spoke with mine engineer J. Randy Campbell for over 2 hours on January 27, 1994.

10. At the time of his discussion with mine engineer J. Randy Campbell on January 27, 1994, Complainant Samuel Knotts was the only representative of the respondents on the surface of the Coalbank Fork No. 12 Mine.

11. On September 1, 1993, Complainant Samuel Knotts testified on behalf of the Secretary in the case of Secretary ex rel. Perry Poddey v. Tanglewood Energy, Inc.

12. On January 25, 1994, Administrative Law Judge Arthur Amchan issued a decision ordering respondent to pay Perry Poddey over \$9,000 in back wages as a result of the respondent's violation of section 105(c) of the Mine Act.

13. A news story about Perry Poddey's reinstatement with back pay appeared in the January 26, 1994 edition of the Clarksburg Telegram.

14. A news story about Perry Poddey's reinstatement with back pay appeared in the January 26, 1994 edition of USA Today.

15. Complainant Samuel Knotts engaged in protected activity under the Mine Act when he testified in the case of Secretary ex rel. Perry Poddey v. Tanglewood Energy, Inc.

16. Complainant Samuel Knotts engaged in protected activity under the Mine Act to the extent that he assisted mine safety and health inspectors in locating violations.

17. Complainant Samuel Knotts received \$3,640 in unemployment benefits from the State of West Virginia since his termination by respondent on January 28, 1994.

18. Complainant Samuel Knotts is presently employed by the West Virginia Department of Highways and has been so employed since July 1, 1994, working 40 hours per week at a rate of \$7.85 per hour. Prior to his full-time employment Mr. Knotts worked part time for the Department of Highways for 2 months.

19. At the time of his discharge by respondents, complainant was working 40 hours per week at the rate of \$10.00 per hour plus occasional overtime at time-and-a-half.

FINDINGS OF FACT

Having considered the record evidence in its entirety, I find that a preponderance of the reliable, relevant, and probative evidence establishes the following findings of fact:

1. Complainant Samuel William Knotts was employed as an outside man for the respondent, Tanglewood Energy, Inc. and Fern Cove, Inc. for approximately 3 1/2 years at the Coalbank Fork No. 12 Mine prior to his discharge on January 28, 1994.

2. Respondent Randy Burke is President of Fern Cove, Inc. and of Tanglewood Energy, Inc.

3. Respondent Randall Key is a part owner and officer of Fern Cove, Inc. and Vice-President of Tanglewood Energy, Inc.

4. Inspector Kenneth W. Tinney testified concerning two citations written in November of 1992, and another on January 6, 1993, for a repeat violation concerning a discharged cylinder on the belt fire suppression system. He discussed these violations with Knotts and Key, and after the November citations Knotts asked him not to use his name in discussing violations with the company anymore "because they 'kind of' blamed him for getting the citations." Key stated that he did not recall Tinney at any time mentioning an employee's name during discussions of safety violations, but Key admitted that he probably discussed the violations with Knotts because certain actions needed to be taken to correct the same and Knotts was the individual with the responsibility for checking the cylinder and had the responsibility to report any problems to Key.

5. Inspector Reed testified that on one occasion in July of 1993, when MSHA inspectors were having trouble reconciling training certificates with an outdated list of certified employees that was kept in the mine office, Knotts suggested they compare the training certificates to current time sheets that he pointed out to them. This resulted in Inspector Reed coming up

with four employees that had not received their training, for which he wrote a withdrawal order. Reed also testified that Knotts told him later on a return visit that he "got pretty well chewed out over the training records."

6. On August 10, 1993, Knotts made a verbal complaint to Inspector Reed of unsafe electrical practices that led to an electrical inspection of the mine. The electrical inspection resulted in a number of violations being issued. There was, however, no testimony that the respondents knew that the electrical inspection was a result of a complaint originating with Knotts.

7. Respondents were generally aware, however, that Knotts was particularly helpful in assisting mine safety and health inspectors in locating violations.

8. On September 1, 1993, Knotts testified on behalf of the Secretary in the case of Secretary ex rel. Perry Poddey v. Tanglewood Energy, Inc., 15 FMSHRC 2401 (ALJ) (1993). He gave

testimony that directly supported the testimony of Perry Poddey, the complainant in that case, concerning who bore responsibility for repairing certain equipment. In his November 29, 1993 decision finding respondent Tanglewood Energy, Inc. guilty of violating section 105(c) of the Mine Act, Judge Amchan specifically cited Knotts' testimony as supporting his finding against the respondent on this issue, which Judge Amchan described as "[p]ossibly the most critical issue in th[e] case." Secretary ex rel. Perry Poddey v. Tanglewood Energy, Inc., 15 FMSHRC 2401, 2410-2411 (ALJ) (1993). On January 25, 1994, 3 days before Knotts was fired, Judge Amchan issued a Decision on Damages ordering Tanglewood Energy, Inc. to pay Perry Poddey over \$9,000 in back wages and interest as a result of the respondent's violation of section 105(c) of the Mine Act.

9. A news story about Poddey's reinstatement with back pay appeared in the January 26, 1994 edition of the Clarksburg Telegram, and the January 26, 1994 edition of USA Today. The story was also reported on television.

10. Mine engineer J. Randy Campbell arrived at the Coalbank Fork No. 12 Mine on January 27, 1994, to conduct an inspection as a representative of the land owners of the property, or in his words "to investigate whether or not the operators were efficiently mining the coal and concerning their production."

11. Campbell's inspections, which generally lasted from 1 to 4 hours, usually included asking questions of rank and file miners like Knotts because he felt the information he obtained from rank and file miners tended to be more specific and more accurate. He would also usually ask rank and file miners about morale at a mine because of its correlation to production.

12. There is a lot of contention in the record concerning the length of the conversation between Campbell and Knotts on the morning of January 27, 1994. Respondents produced a lot of evidence that, if found credible, would tend to establish the conversation went on for 2 hours. On the other hand, the two participants to the conversation contend it was for no longer than 45 minutes, and was conducted, at least for a part of the time, while Knotts busied himself with other tasks around the mine office. During this time, they discussed the mine's violation history, the condition of the batteries on the ram cars; the bypassed electrical components on the mantrips, including the three-wheelers and four-wheelers and the fact that a lot of them were junk or needed substantial work to be repaired. They discussed morale issues generally, and they talked about management and problems with management, vacations, and the lack of vacation pay, as well as the fact that Messrs. Key and Burke were involved at other mines and that Key had not been working at this mine until the recent past few months. More particularly, they discussed Key and Burke's management style and Burke's new truck. The truck's relevance stems from the notion that if Burke could afford a new truck, he could also afford to give miners a paid vacation, which they had not had for the last 2 years. Apparently, the truck had become a "morale" issue at the mine, and Knotts thought it appropriate to pass that information to Campbell.

Interestingly, both Campbell and Knotts testified that Knotts stated at the time that he could be fired if management could hear his comments to Campbell. Mr. Key did hear those

comments via an open mike telephone line and as he predicted, Knotts was fired the next day. In order to resolve the timing issue, I find as a fact that the Knotts/Campbell conversation on

January 27, 1994, lasted from 1 hour 15 minutes to 1 hour 30 minutes. In so finding, I have given the greater credibility to the disinterested witnesses. First of all, Mr. Campbell stated that he arrived at the mine between 7:30 a.m. and 8:30 a.m., and that at least 45 minutes elapsed after his arrival before he began his conversation with Knotts. He also stated that he finished his conversation with Knotts and left the mine somewhere between 9:00 a.m. and 9:30 a.m. Operating at the extremes of those limitations, I deduce the conversation could have been as long as 1 hour and 15 minutes. Secondly, Mr. Young, although he seemed uncertain and confused about some of the details of that morning, has the advantage of no longer working for the respondents and seemingly "has no dog in this fight." He estimated the time during which Key listened into the conversation on the open line telephone as "at least an hour and a half."

13. The decision to terminate Knotts was made by Key and agreed to by Burke. He was actually discharged at a meeting held in Key's office on January 28, 1994.

DISCUSSION AND CONCLUSIONS

The principles guiding the Commission's analysis of discrimination under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-2800. If the operator cannot rebut the prima facie case in this manner, he nevertheless may defend affirmatively by proving that he also was motivated by the miner's unprotected activity and

would have taken the adverse action in question for the unprotected activity alone. 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987).

It is stipulated that Knotts engaged in protected activity under the Mine Act when he testified in the case of Secretary ex rel Perry Poddey v. Tanglewood Energy, Inc. and also to the extent that he assisted mine safety and health inspectors in

locating violations. Furthermore, I find that his discussion with Campbell on January 27, 1994, also constituted protected activity under the Mine Act to the extent that Knotts made safety-related complaints to Campbell concerning the condition of equipment at the mine. I also find that the complaints were truthful. In fact, much of the mine equipment was in poor condition. The company had five golf carts (or four-wheelers) and none were operable at the time of Knotts' discharge. At the time of Campbell's visit, there was no ride available to bring him underground, a condition that had occurred at least once before. The ram cars had been brought over from another mine and had old worn out batteries that would not hold a charge. A number of vehicles were observed to have been rewired so that essential safety components were either bypassed or disconnected.

State Safety Instructor Thomas Bass and MSHA Inspector Virgil Brown testified at length as to the possible dangers these conditions posed, and Knotts himself described problems he and other employees had experienced with faulty equipment.

While the complainant need not possess any specific intent in making statements regarding safety or health in order for his statements to be considered protected activity, it is clear here that the complainant had a specific intent when relating certain information to Campbell. The complainant reasonably perceived Campbell to be an agent of the land owners who he thought would or could exert pressure, either directly or indirectly, on the respondents to improve safety at the mine. When the complainant was asked at the hearing what his purpose was in telling Campbell about the repeated electrical violations, the complainant responded that he thought the mining conditions would improve as a result of his having spoken up and that the working conditions at the mine would in turn become safer for the men. I find that

the complainant was motivated by the fact that he reasonably thought Campbell's communication with the land owner could positively influence safety at the mine.

The adverse action in this case was, of course, the discharge. It is stipulated in this record that the reason for the discharge was his conversation with Campbell. Thus, there is a clear nexus between one of the instances of protected activity and the adverse action. The nexus between the other two instances of protected activity and the adverse action is less clear. I find a very fragile connection, if any; perhaps I would liken it to background noise that maybe set the scene for Knotts' discharge. The earlier incidents involving MSHA inspectors are very remote in time to complainant's discharge and are not more than peripherally relevant or material to the discharge itself.

With regard to his testimony in the Poddey case, it also is relatively remote in point of time. He testified on September 1, 1993, and the decision on the merits was issued November 29, 1993.

In any event, Knotts' discharge was motivated at least in part by his protected activity and therefore, I find that the complainant has made out a prima facie case of discrimination under the Mine Act. I also find that the respondents are unable to rebut this prima facie case by showing that no protected activity occurred or that adverse action was in no way motivated by the protected activity. The preponderance of the evidence is clearly to the effect that Knotts' engaged in protected activity and that his discharge was motivated at least in part by that protected activity.

When a prima facie case is established, a respondent may defend affirmatively by showing that it was also motivated by an unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone. Of course, the respondent bears the burden of proof with regard to this affirmative defense. Haro v. Magma Copper, 4 FMSHRC 1935 (1982).

Respondents here argue that complainant's discussion with Campbell contained both protected and unprotected aspects and that complainant was discharged for the unprotected aspects, alone.

There are two distinct problems the respondents had with this conversation. First, it was too long. And secondly, it was personally slanderous to both Key and Burke, at least in part.

With regard to the first, I have found it was 75 to 90 minutes long. The Secretary makes an excellent point in his brief to the effect that however long it was, respondent Key condoned that activity. He stated that the underground phone could have been used to call the surface at any time during the conversation. According to his testimony, he easily could have pressed down the button on the phone after the first 5 minutes of the discussion, and told the complainant to get back to work. Key's inaction is no different than if he was on the surface, saw Knotts talking to Campbell and did nothing to terminate the conversation. Moreover, for whatever amount of time he spoke to Campbell, the complainant was essentially doing his job. He was the only employee on the surface at the time Campbell visited the mine and his job duties included answering questions of more or less "official" visitors, like Campbell. It was Campbell who initiated the discussion with complainant, as he had done on previous occasions. He began questioning complainant because respondents had not been able to provide him with a ride underground, he was not satisfied that he had received sufficient information from respondents over the phone to prepare his report, and because he believed that complainant was as knowledgeable about mine operations as anyone else at the facility. And most of what the complainant stated was in the form of embellished responses to questions put to him by Campbell.

Turning to the content of the conversation, it is true that certain portions of what Knotts was passing on to Campbell could be characterized as "gossip" and inflammatory language at that. However, I find that in the context of the coal mining industry this was pretty mild stuff compared to many other cases which come before the trial judges of this Commission. I therefore conclude that the unprotected portions of the Knotts/Campbell conversation could not reasonably have formed the basis for Knotts' discharge without more.

On balance, I find that the respondents did not meet their burden of proving the affirmative defense.

Accordingly, I conclude that respondent terminated complainant's employment on January 28, 1994, in violation of section 105(c) of the Mine Act.

ORDER

WHEREFORE IT IS ORDERED that:

1. Within 15 days of this decision, the parties shall confer in an effort to stipulate the amount of complainant's back pay due, interest on that amount, and litigation costs as well as a reasonable civil penalty for the violation found herein, considering the six statutory criteria contained in section 110(i) of the Mine Act. Such stipulation as to damages shall not prejudice respondent's right to seek review of this decision. If the parties agree on damages, the Secretary shall file a stipulated proposed order on damages within 30 days of this decision. If the parties do not agree, the Secretary shall file a list of mutually agreed upon trial dates for a further hearing on the issue of damages, including the civil penalty to be assessed herein.

2. Respondents shall expunge any reference to his January 28, 1994 discharge from Mr. Knotts' personnel file maintained by the company.

3. This decision will not become final until a subsequent order is issued concerning damages and penalty.

Roy J. Maurer
Administrative Law Judge

Distribution:

James Blair, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203 (Certified Mail)

Paul O. Clay, Jr., Esq., Laurel Creek Road, P. O. Box 746, Fayetteville, WV 25840 (Certified Mail)

dcp